



REPUBLIC OF KENYA



KENYA LAW
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**Atito v Ochiewo & another (Environment & Land Case
48 of 2020) [2022] KEELC 12568 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 12568 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 48 OF 2020
A OMBWAYO, J
AUGUST 5, 2022
IN THE MATTER OF LIMITATION OF ACTIONS, CAP 22 LAWS
OF KENYA
IN THE MATTER OF AN APPLICATION FOR A CLAIM OF
ADVERSE POSSESSION

BETWEEN

LUKIO ONGONDO ATITO PLAINTIFF

AND

OYOWE OCHIEWO 1ST DEFENDANT

AKUDO OCHIEWO 2ND DEFENDANT

RULING

1. Oyowe Ochewo and Akudo Ochiewo, the applicants herein are judgment debtors whereas Lukio Ongondo Atito is the decree holder. The application seeks orders that the court grants stay of execution of the judgment delivered by this court on 6/5/2022 pending the hearing and determination of the intended appeal.
2. The application is based on grounds that the application has been brought timeously and that the applicant will suffer substantial loss if stay is not granted in that the defendants/applicants have been in possession and occupation of the suit parcel of land. The applicants filed a joint supporting affidavit stating that they have embarked on a joint food crop farming on the suit land and have planted cow peas, maize, and beans.
3. On substantial loss, they state that the plaintiff is likely to farm on the land and even sell the same since he is employed and does not operate from the village.



4. The respondent has no prejudice to suffer.
5. The respondent on his part states that the application before this honourable court is brought in bad faith and is only a means of depriving me of the fruits of the judgment entered in my favour.
6. That the bad faith element is apparent from the fact that the applicants only thought to file the said after they were served with the respondent's bill of costs dated May 11, 2022 and served upon the applicants' counsel on the same day.
7. That the above mentioned bill of costs is pending taxation before the Deputy Registrar and the filing of this application is just a clear attempt by the applicants to avoid the provisions of order 42 rule 6 and the provisions of rule 82 of the *Court of Appeal Rules*, 2010 that provides for the furnishing of security for costs before a litigant pursues an appeal before the Court of Appeal.
8. That given that the respondent's bill of costs is yet to be taxed, it is in the interests of justice that the ruling in this application be stayed and/or delayed until the respondent's costs before the trial court are assessed by the Deputy Registrar in a bid to comply with the above-mentioned rules of pursuing an appeal.
9. That in the alternative, given that the respondent's bill of costs has been drawn to scale, the honourable court can order the deposit of such sums of money as it deems fit as security for costs so that the respondent will not be prejudiced in the event the appeal by the applicants herein is dismissed.
10. That the absence of provision for security for costs offends the provisions of rule 82 of the *Court of Appeal Rules* as it exposes me as the respondent herein to the possibility of prolonged litigation if the intended appeal is dismissed as it will oblige me to pursue additional execution proceedings.
11. That the applicant has only served the respondent herein with a notice of appeal which in itself does not amount to an appeal but only serves the purpose of declaring the intention to file an appeal, the application seeks orders of stay of execution pending the hearing and determination seeks orders of stay of execution pending the hearing and determination of an intended appeal which is a prayer unknown to the law given the provisions of order 42 rule 6 which only provides for stay pending the hearing and determination of an actual appeal.
12. That the application, therefore, seeks a blanket order of stay that is only tailored to hold me, hostage, as the same if granted will be purely be based on an event that may or may not happen, the event being the filing of an actual appeal.
13. That the application before this honourable court is therefore premature given that no appeal has been filed and the granting of the orders sought before the court is satisfied that an appeal has been filed is highly prejudicial to the respondent and will only serve the purpose of denying him the fruits of judgment.
14. That the application before this honourable court is grounded upon the fact that the applicants have been in possession of the suit property and have planted crops in the said land.
15. That the above assertion is not fully substantiated as there is no proof tendered before this honourable court of ownership of the said crops.
16. That further, the proceedings before this honourable court will show that during the entire trial of this matter the applicants herein maintained that they were not tilling the land and were merely grazing on the same.



17. That the said planting of crops was therefore done when the matter was still pending in court, a fact that is also apparent given the age of the crops as depicted in the pictures which are all annual crops given the allegations under paragraph 7 of the applicants' supporting affidavit.
18. That the planting of the said crops was done by the applicants with the full knowledge that the matter was still pending before the court and the ownership of the said land had not been decided.
19. That the plaintiff of crops in a land whose ownership status had not been decided amounted to a mistake of the applicants' own making and they cannot be allowed by this honorable court to benefit from their mistake at the expense of the respondent herein who has a judgment in his favor.
20. That the applicants herein come tainted and haunted by their reckless actions and still seek reprieve for this honorable court, the very same court they ignored whilst venturing into the said reckless actions.
21. That it is in the interest of justice that the application herein is dismissed with costs in a bid to protect the dignity of this honorable court as allowing the same would amount to allowing the applicants to benefit from a mistake of their own making.
22. The applicants filed a further affidavit stating that the respondent intends to evict them from the suit property and that the respondent has filed a bill of costs. Order 42 rule 6 provides:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

- a the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

23. I have considered the application and rival submissions and find that the court has already observed that the respondent is in adverse possession of the suit property and therefore the issue of eviction does not arise.
24. The orders issued by this court were declaratory in nature and therefore can't be stayed. The only order that can be stayed is the transfer of the suit property from the applicants to the respondent. For avoidance of doubt it is this court's finding in the judgment that the respondent is in actual possession of the suit property.
25. The upshot of the above is that I do order that the bill of costs be taxed but execution of the certificate of costs be stayed until after determination of the appeal moreover, the County Land Registrar to halt any process of transfer of the land to the decree holder until the appeal is heard and determined. The respondent to remain in use and possession of the suit property until the hearing and determination of the appeal.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF AUGUST, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

